PUBLIC PROSECUTOR

v.

RUDY JAMLALI

HIGH COURT BORNEO
SYED AHMAD IDID JC
[CRIMINAL TRIAL NO. 16 of 1987]
7 MAY 1991

CRIMINAL PROCEDURE: *Possession - Presumption of - Whether power of disposal is a requisite, s. 37(da), Dangerous Drugs Act 1952.*

EVIDENCE: *Adverse inference - Principles of s. 114(g) Evidence Act.*

The accused was charged with trafficking in dangerous drug, to wit, cannabis weighing approximately 714.5 grammes. He had thereby committed on offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised 1983), and punishable under s. 39B(2) of the same Act.

Defence Counsel tried to create doubts as to whom the drug was with at the time the ambush took place and questioned whether proper identification of the accused and the other person Bairulia (jointly charged with him but the charge against him was later dropped) was made.

However, the witness had no doubts as to the identity of the accused and Bairulia and there was corroboration to what was said in evidence by the other witnesses.

The defence Counsel also raised the issue that Bairulia who was an important witness was absent from Court and whether an adverse inference can be drawn against the prosecution for failing to produce this witness.

The learned DPP argued that adverse inference can only be drawn for non-production of an important and material witness.

The defence Counsel urged the Court to release the accused on her plea of no case to answer. She also submitted that the burden is on the prosecution to prove beyond all reasonable doubt that the accused committed the offence as charged.

Held:

[1] On the facts and the law, the Court found that there was a case to answer and the accused was called to enter his defence.

[2] As no question was raised as regards any break in the chain of custody, the presumption in s. 114(g) of the Evidence Act acts in favour of the prosecution.

[3] The accused had possession of the drugs on the evidence and as the amount exceeded 200 grammes (it being 714.5 grammes) the presumption that he trafficked comes into play by virtue of s. 37(da) of the DDA 1952.

[4] The accused was not able to rebut the presumption under the said Act.

[Accused found guilty. Sentenced to death.]

Cases referred to:

PP v. Abu Bakar Bin Abdul Malek [1990] 2 CLJ (Rep) 674 ***(cit)***
Munusamy v. PP [1987] CLJ (Rep) 221 ***(cit)***
PP v. Lim Teong Seng & 2 Ors. [1946] 12 MLJ 108 ***(cit)***
Leow Nghee Lim v. Reg. [1956] 22 MLJ 28 ***(cit)***

PP v. Ang Boon Foo [1981] 1 MLJ 40 ***(cit)***
PP v. Tan Seow Chuan [1985] 1 MLJ 318 ***(cit)***
R v. Turnbull [1976] 3 All ER 547 ***(not foll)***
PP v. Fom It Cheong [1991] 3 CLJ (Rep) 524 ***(cons)***
PP v. Lim Ah Bek [1989] 2 CLJ (Rep) 391 ***(cons)***
PP v. Kau Joo Huat [1988] 1 CLJ (Rep) 258 ***(dist)***
PP v. Rosyatimah Bte Neza & Anor. [1989] 2 CLJ (Rep) 364 ***(cit)***
Haw Tua Tau v. PP [1981] CLJ (Rep) 11; [1982] 1 MLJ 139 ***(cit)***
Krishnan & Anor. v. PP [1981] 2 MLJ 121; [1982] CLJ (Rep) 152 ***(cit)***
D.A. Duncan v. PP [1980] 2 MLJ 195 ***(cit)***
PP v. Badrulshah Bin Baharom [1988] 2 MLJ 585 ***(cit)***
PP v. Tan Huang Hiang [1990] 2 MLJ 24 ***(cit)***
PP v. Chew Yoo Choi [1990] 2 MLJ 444 ***(cit)***
PP v. Tee Kim Pong [1990] 2 CLJ (Rep) 868 ***(cit)***
PP v. Lim Chang Min [1990] 2 MLJ 497 ***(cit)***

Legislation referred to:
Criminal Procedure Code, ss. 180, 270(1), 273, 277
Dangerous Drugs Act 1952, ss. 2, 6, 37(d), (da), 39B(1), (1)(a), (2), (3), 41A(1)
Evidence Act, ss. 60, 114(a), (g)

For the public prosecutor - N. Rajendran
For the defendant - Chin Pau Shien; M/s. Alex Pang Shim & Co.

JUDGMENT

Syed Ahmad Idid JC:

The trial commenced on Tuesday, 22 January 1991 and continued on 23, 24 and 25 January 1991 and on 15 March 1991. Nine witnesses gave evidence for the prosecution whereas only the accused gave evidence from the witness stand on his own behalf.

Nine exhibits were tendered in Court (and admitted) including the Consent [pursuant to s. 39B(3) of the Dangerous Drugs Act 1952 (Act 234)] and Requisition (under s. 41A(1) of the Act) dated 8 August 1987 at Exhibit P1.

The charge against the accused read as follows:

> That you on or about 16 January 1987 at about 8.50 p.m. at the back of Yit Thai Engineering, Mile 5, Jalan Tuaran, in the District of Kota Kinabalu, in the State of Sabah, on your own behalf or on behalf of any other person, did traffic in a dangerous drug, to wit, cannabis weighing approximately 714.5 grammes and you have thereby committed an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised 1983) and punishable under s. 39B(2) of the same Act.

The offence was said to have taken place on 16 January 1987, some four years ago.

At the commencement of the trial, Hajjah Norliza (the Court's Suluk Interpreter) read and explained the charge to the accused (who is versed in Suluk and a Suluk himself) and the accused maintained his plea of not guilty. Throughout the trial evidence was interpreted to accused in Suluk, the language he understands [s. 270(1) of the Criminal Procedure Code is relevant].

According to the sketch plan of the area where the crime was committed (at Exhibit P6) the Yit Thai Engineering is a building 58m x 17m enclosed within a wire-fence. There are electric lights in some areas and a lamp near the scene where the accused was arrested.

(i) The prosecution opened their case with PW1 Khalid bin Safan, Senior Government Chemist of the Chemistry Department, Sabah, who told the Court that he has served the Department since 1976. He holds a B.Sc. (Hons) in Chemistry. He explained the experiences he has formed to familiarise himself with the examination and analysis of dangerous drugs such as cannabis, heroin, morphine and opium. Accordingly, the Court accepted him as an expert witness.

(ii) PW1 informed the Court that ASP Lim Yet Kong (later to give evidence as PW2) handed him a brown paper package marked "X" and sealed together with a police request form. The seal bore the words "Polis Diraja Malaysia 313". A receipt was issued as follows:

Receipt Department of Chemistry
Kuala Lumpur/Penang
Date 17 January 1987

Received per G/4551 ASP Lim Yet Kong, satu (1) bungkusan marked 'X' KK/RPT/538/87 with seals intact: also an impression of the seal used 'Polis Diraja Malaysia 313'.

Station Kota Kinabalu Report No. 538/87 Lab. No. 149/87.

sgd:
cop: Jabatan Kimia Malaysia
Kota Kinabalu Cawangan Sabah
Director of Chemistry Malaysia,
Kuala Lumpur
Senior Chemist, Penang

(iii) PW1 carried out three tests on the contents, that is the vegetable matter in the paper package marked 'X':

(a) Duquenois Levine - This called for the extraction of the resins from the vegetable matter by using petroleum spirits. Then PW1 added the DL (or Duquenois Levine) agent plus concentrated hydrochloric acid and allowed the residue and the agent to mix. A blue coloration was obtained. To this blue coloration chloroform was added and after some time the chloroform layer turned purple. This was a positive indication that the resins extracted from the vegetable matter in the package marked 'X' was cannabis resin.

(b) TLC or Thin Layer Chromatography. After extracting the resins from the vegetable matter, PW1 spotted the resin on the TLC glass plate on which there was a layer of selica gel. PW1 then placed the TLC plate inside a glass tank containing chemical Tonuent used as solvent. After this was left for some time, it was taken out to dry and then sprayed with Methanolic Fast Blue B. There were spots on the plate.

(c) Microscopic Examination. From this test, PW1 obtained the microscopic structure of cannabis plant with the cystholithic hairs which come from the leaves of cannabis plant, next the simple hairs from the stem or stalk and the stigma with papillae which comes from the flowers of cannabis plant.

(iv) By Exhibit P3, PW1 signed a certificate as follows:

Jabatan Kimia Malaysia
Makmal Cawangan Sabah
No. Makmal 149/87
9 Februari 1987

Laporan Dibawah Seksyen 399 Kanun Acara Jenayah Bab B

Saya, Khalid Safan Ahli Kimia Malaysia dengan in memperakui bahawa pada pukul 10.45 pagi pada 17 Januari 1987, telah diserahkan kepada saya oleh PPP Lim Yet Kong, satu (1) bungkusan yang bertanda 'X' dan bermeteri 'Polis Diraja Malaysia 313'. I examined the package submitted and found in it a white plastic bag labelled 'A' containing brown paper bag labelled 'B' which contained a newspaper package tied with a pink raffia string labelled 'C'. I found the newspaper package to consist of a layer of a Chinese newspaper labelled 'D' and a layer of 'Sabah Times' newspaper labelled 'E'. I found in the newspaper package 714.5 grammes of a slab of dried vegetable matter which, on analysis, I found to be cannabis. Cannabis is as defined in s. 2 of The Dangerous Drugs (Amendment) Act 1983. Selepas diperiksa exhibit-exhibit itu telah dimeteri "Jabatan Kimia, Cawangan Sabah, Malaysia" dan diserahkan balik bersama-sama dengan Laporan ini kepada PPP Lim Yet Kong pada pukul 11.00 pagi pada 11 February 1987.

Ketua Polis Daerah
Kota Kinabalu
K/Kinabalu Polis Rpt. No. 538/87

sgd:

(Khalid Safan)
Ahli Kimia
Jabatan Kimia
Kota Kinabalu

(i) PW2's part in the episode was in receiving a phone call from ASP Zainuddin (later to become PW4) informing him at 9.40 p.m. on 16 January 1987, that PW4 and his men had arrested two Filipinos at the back of a Chinese Temple, Mile 5, Tuaran Road, and about ½ kilo of ganja was seized. PW4 handed PW2 a white plastic bag which later came to be marked as Exhibit P4 (together with 4A, 4B, 4C, 4D, 4E, 4F, 4G and 4H) or the package 'X' which he later handed to the Senior Government Chemist (PWl). Two suspects in Rudy Jamlali (or the accused here) and Bairulia Hasim were detained.

(ii) According to PW2, he questioned both suspects but they denied. Both were later charged jointly. Bairulia was released around 8 August 1987, but PW2 did not know why this was so. "I followed instructions" was all he could say in answer to learned defence Counsel's question but it was PW2's decision to charge both "as it was the practice." While PW2 decided to charge both suspects on the 1st Investigation Report, he also agreed with defence Counsel that that Report did not give the facts, that is regarding the two arrests, fully.

(i) ASP Zainuddin, or PW4, was the main witness as he was the leader of the raiding/ ambush party. On receipt of information, he banded his men together as they assembled at the Chinese Temple, Mile 5, Jalan Tuaran. There Cp1. Lin pointed to the spot where the ambush was to be conducted, that is, at Yit Thai Engineering.

(ii) PW4 drew the sketch of the place and also indicated the situation of the buildings, ambush positions of the groups and the lights. The information was clear that two Suluk men would be coming. The agreed signal was "Polis, Jangan Lari" and when this was yelled, all in ambush were to come out.

(iii) At about 8.50 p.m. on 16 January 1987, PW4 saw two men climbing up through the fence. One of the two was wearing a white T-shirt and this man carried a white plastic bag. The other man who was following was wearing a yellow T-shirt. The man in white T-shirt was Rudy bin Jamlali while that in yellow was Bairulia bin Hasim. PW5, PW6, PW7 also attested to the same occurrence. When both men were inside the fence, PW4, with three men (at ambush position A, B, C, D) moved out towards the two men and then PW4 shouted "Polis Jangan Lari". The accused threw the white plastic bag that he was carrying and tried to turn back through where he had entered but he was arrested by PW4's men. PW4 picked up the plastic bag and this was the Exhibit P4.

The accused, according to PW6 (and also stated by PW4) was arrested by PW6, DPC Ong Teck Lee. who was with Constable Murad and Constable Michael Chan (PW7).

PW4, in the presence of the two men, opened the plastic bag and examined the contents which were "dried vegetable leaves". PW4 has held this exhibit and never let the chain of custody break. He lodged a report No. 538/87 at Rumah Pasong Kota Kinabalu on 16 January 1987 at 9.25 p.m. (Exhibit P7). Then he handed the two men and the exhibit to PW2.

Miss Chin Pau Shien, the learned defence Counsel, tried hard to break this witness who had been in the police force for 17 years. The cross-examination was a rehearse of what PW4 had said in the examination-in-chief. The colour of the shirts the two men were wearing distinguished one from the other. PW4 was sure it was the accused whom he saw holding the plastic bag which contained the cannabis. Could it not have been another person who was holding the bag and not the accused? PW4 replied that it was the man in white T-shirt, that is the accused who was holding the bag. PW4 had no doubts about the identity of the accused.

The learned DPP stood up a couple of times with his objections to Miss Chin's questioning regarding:

(i) knowledge as to who was carrying the bag prior to the time PW4 saw accused carrying it;

(ii) the bag not being in possession of the accused.

He cited s. 60 of the Evidence Act, that is oral evidence must be direct.

PW5 Lin Yusof saw ASP Zainuddin (PW4) holding a "bungkusan" or bag and a man in handcuff with three police personnel. He recognised the accused. PW5 was the police personnel who had earlier received the information. He told the Court that the informer had showed the place where the two men would be going to. There was no cross-examination on his evidence.

DPC Ong Teck Lee (PW6) confirmed what PW4 had said in that he was with PW4 and DPC Murad and DPC Michael Chan at DCBA and secondly that he saw the accused carrying the bag with another person who did not carry anything and that he chased the accused and arrested him. He gave the name of the accused as Rudy Bin Jamlali and identified the accused. He said DPC Murad handcuffed the accused at the spot.

The question of whether the lighting at the scene of the crime, that is at the Yit Thai Engineering, was sufficient to enable proper identification of the accused and the other person was raised. Put to the prosecution witnesses, defence Counsel was only able to get a reinforcement of what the witnesses had said earlier, that is, it was sufficient for them to

spot the accused and the other man and they saw both. PW7 said, "The rays were bright." "Saya nampak terang-terang". "I was positively sure as the first person was wearing a white T-shirt and also holding a white plastic bag."

PW7 Michael Chan corroborated what PW4 had said in evidence. He also saw the two men, one of whom he identified as the accused. He confirmed he could see the accused walking into the Yit Thai compound, wearing white shirt and carrying a bag white in colour. It was, to him, "jelas kelihatan dan terang". He also explained that the accused was "arrested by DPC Ong and then myself and DPC Murad handcuffed him". He also identified the exhibit P4 with the ganja inside. He added that "when I arrested the accused, he struggled to free himself".

Bairulia, the man who was with the accused at time of the arrest and seizure, was absent from Court. The DPP explained that he knew Bairulia was an important witness so that was why he served the summons on him. "If he fails to come to Court it is not the fault of the prosecution." PW6 was then called. He said that "Bairulia tidak ditemui dihospital Bukit Padang". PW8 D/C Janjin Asun was another who tried to serve the warrant of arrest who failed to locate Bairulia. PW9, Manchulina Wong was the third who was instructed to locate Bairulia but could not do so. Miss Chin cited the case of *Public Prosecutor v. Abu Bakar Bin Abdul Malek* [1990] 2 CLJ (Rep) 674 at p. 675 at Held (5) and (6):

> (5) The question here is whether an adverse inference can be drawn against the prosecution for their failure to produce this witness in view of the actions of the police ... The police could have kept the woman in the country by utilising s. 396 of the Criminal Procedure Code ("the CPC") (detention pending trial) or make application for her testimony/deposition to be recorded before she departed or inform the Immigration Authorities accordingly to enable the woman to be detained further pending this trial - there were therefore legal avenues open to the police to secure either the attendance of the woman as a witness or to have her evidence recorded at an earlier date and the police are directly responsible for placing the woman out of the jurisdiction of the Court ...

The learned Deputy Public Prosecutor replied by citing *Munusamy v. PP* - Adverse inference (under s. 114 of the Evidence Act) can only be drawn for non-production of an important and material witness to the case. In *Munusamy v. PP* [1987] CLJ (Rep) 221. Mohd. Azmi SCJ said that:

> ...It is essential to appreciate the scope of s. 114(g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case...

(i) Miss Chin, at the close of the prosecution case, decided to urge the Court to release the accused on her plea of no case to answer. She submitted that it was for the prosecution to prove every ingredient of the offence and the burden on the prosecution was to prove beyond all reasonable doubt that the accused committed the offence under s. 39B(1)(a) of the Dangerous Drugs Act. See the case of *PP v. Lim Teong Seng & 2 Ors*. [1946] 12 MLJ 108 where Laville J said that "the prosecution who have to prove their case beyond all reasonable doubt have produced all the evidence they have, and it is on this evidence the conviction if any must rest, even if accused calls evidence". Whereas the burden on the accused to rebut any presumption raised was merely on a balance of probabilities. Further, any presumption may be rebutted by circumstances

appearing in the prosecution evidence. See *Leow Nghee Lim v. Reg.* [1956] 22 MLJ 28 at 29 and 31 which explains custody and possession. See also *PP v. Ang Boon Foo* [1981] 1 MLJ 40. Defence Counsel submitted that there was no case to answer as the prosecution had failed to adduce evidence relating to the essential elements of the offence. See also case of *PP v. Tan Seow Chuan* [1985] 1 MLJ 318. She claimed that no evidence was adduced by the prosecution that the accused had the power of disposal over the package Exhibit P4 in the, the sense of being able to deal with the same as owner to the exclusion of all others, in this case, Bairulia. She also stated that the accused was not caught red handed with the drugs.

(ii) She quoted the case of *R v. Turnbull* [1976] 3 All ER 547. This concerns the identification of the accused. There was no doubt in the words of the prosecution witness that the accused was the one who carried the cannabis at the time, date and place recorded in the charge. But as that case was relevant to cases with a jury I shall disregard it. Learned defence Counsel then went on to say that the steps which were taken by the police subsequent to the arrest of the accused and Bairulia further threw doubt as to the weight to be attached to their identification evidence. She claimed that PW4 prepared a First Investigation Report 'P7' soon after the arrest (that is 22 January 1987). She added that he had stated specifically in his Report that "telah menangkap 2 (dua) lelaki kerana memiliki satu beg plastik". The police subsequently went ahead to charge the accused and Bairulia jointly under s. 39B of the Dangerous Drugs Act. The joint charge was only dropped on or about 14 August 1987, that is, 17 months after the arrest.

She submitted that there was a danger of mistaken identity, though honest and that a number of witnesses could all be mistaken. In the present case, the identification evidence was never corroborated by a finger print test on the package Exhibit P4. The prosecution witnesses had confirmed that in fact no finger print test was ever done on the package P4 and there can be no reason why this was never done. She added that the fact that the accused was arrested nearer to the package Exhibit P4 was neither here nor there and certainly did not give rise to the presumption under s. 37(d) of the Dangerous Drugs Act. She doubted why no finger print dusting was carried out and so she asked that the benefit of the doubt must be given to the accused. Refer to the cases of *PP v. Fom It Cheong* [1991] 3 CLJ (Rep) 524:

> Held (3): A doubt was raised as to why no finger print dusting was carried out on the drug exhibits. The benefit of the doubt must be given to the accused; in addition, F's T-shirt shorts and nail diggings did not contain any traces of heroin.

and *PP v. Lim Ah Bek* [1989] 2 CLJ (Rep) 391:

> Held 1(iv): She had raised a reasonable doubt as from the chemist report that there was no trace of morphine or heroin on the accused's nail clippings and the plastic bag was not dusted for fingerprints.

(iii) Coming to the presumption of possession, Miss Chin cited the following authorities to show that "a power of disposal" to the exclusion of all others is required:

(1) *PP v. Ang Boon Foo* [1981] 1 MLJ 40. It was decided that if the accused could show, on the balance of probabilities that although he had something in his custody or under his control yet he did not have the power of disposal, then, he would have rebutted the presumption under s. 37(d) of the Dangerous Drugs Ordinance 1952, and would have shown that his custody or control of the things concerned did not in the circumstances amount to possession under the said Ordinance.

(2) In the case of *PP v. Tan Seow Chuan* [1985] 1 MLJ 318 it was held that it was a matter of grave doubt as to whether the accused had custody or control of the opium found in the room in the house. In any event, he had no power of disposal of the opium and could not be said to have possession of it. The accused was in that case acquitted.

(3) The above mentioned two cases were never overruled in the Supreme Court case of *PP v. Kau Joo Huat* [1988] 1 CLJ (Rep) 258 where it was decided on a question of law referred to the Supreme Court that to support a conviction it was wrong to say that the accused must have a power of disposal. In this case, the accused was charged with possession under s. 6 of the Dangerous Drugs Act and not for trafficking.

(4) In the subsequent case of *PP v. Rosyatimah Bte Neza & Anor*. [1989] 2 CLJ (Rep) 364 the learned Judge Peh Swee Chin explained the reasoning behind the above case or *PP v. Kau Joo Huat*. Justice Peh Swee Chin decided in the case of *PP v. Rosyatimah* that upon the finding of the absence of power of disposal, though it did not render the possession non-incriminating, it was in his view one of the relevant factors, though, by no means conclusive standing by itself for the Court to consider if she had, on a balance of probabilities, rebutted the presumption of trafficking. The accused in that case was convicted for the offence of possession instead of trafficking.

(i) The DPP in response quoted the authority of *Haw Tua Tau v. PP* [1981] CLJ (Rep) 11 adopted by the Supreme Court in [1982] 1 MLJ 139. So long as there is some evidence not inherently incredible to establish the elements of the offence, defence must be called.

(ii) As for power of disposal which Miss Chin had argued on, the learned DPP cited *PP v. Kau Joo Huat* [1988] 1 CLJ (Rep) 258 at p. 260 where Lee Hun Hoe CJ (Borneo) said:

> Although on the particular facts of the case we consider the learned Judge right to allow the appeal, we are of the view that he was wrong to say that the accused must have the power of disposal to support the conviction. For instance, a person stole a dangerous drug knowing the thing he was stealing was a dangerous drug, legally he would have no power to dispose of it. If he was arrested by the police while in possession of the stolen dangerous drug he could successfully be charged under the Dangerous Drugs Act with possession of it and he would even be convicted of trafficking if the amount of the drug in his possession was sufficient for the charge of trafficking, although he had no power to dispose of it.

On the facts and the law before me, and after consideration of the seriousness of the offence and the dangers of the charge being defective, I found there was a case to answer and so I called upon the accused to enter his defence in accordance with s. 180 Criminal Procedure Code.

Prior to that, I had also told both parties:

> Before we begin this morning's continuation, I want to draw the attention of both the learned DPP and the learned defence Counsel to the laws relating to the procedure in Court ... the learned DPP had stood up on several occasions to object to Counsel's questions. The Evidence Act is clear that by s. 146, there is some leeway in cross-examination. The Court's attention was drawn to s. 60, Evidence Act... so see also s. 60(d) therein. As to admissibility of evidence, the Court will decide. This is stipulated in s. 136 Evidence Act. There was a matter of refreshing memory by witness. Though in the final analysis, there was no need to invoke the precedent pointed out by learned defence Counsel, learned DPP objected and cited s. 159 of the Evidence Act ... but then by s. 161 there is right of adverse party also ... The accused faced a serious charge and this Court wants to be as comprehensive as possible in allowing the defence its due.

When defence was called, the accused's story was as follows:

> That he came from the Philippines to Sabah in 1989. He is Suluk. On the evening of 16 January 1987, he met Bairulia who told him that at 8.00 p.m. they would go to Inanam. They boarded a bus with Bairulia's two other friends. On arrival at the Tok Pek Kung Cina (Chinese Temple) all alighted. They approached the temple. Bairulia climbed the fence and when they were inside on the grounds, he heard 'Polis Jangan Lari'. He added that 'Saya tidak bawa apa-apa'.

(i) The DPP was unable to break the accused in cross-examination. He stuck to his story. Then the learned DPP tried to cross-examine the accused on a statement that he had purportedly made to Inspector Lai Boon Cheng. As this was an indirect method of bringing in evidence which the prosecution should have adduced during their time, I disallowed it despite the DPP's citation of *Krishnan & Anor. v. PP* [1982] CLJ (Rep) 152. So I ruled as follows:

> I am of the view that all the prosecution case should have been put in in toto at the stage of the prosecution's case and not by another method at this stage. The statement recorded by Lai Boon Cheng was not put into the evidence then. Lai was not called as a witness though he was offered on a list of other witnesses to the defence. I am of the view that there is a time-honoured procedure. *Krishnan's* case at p. 157. I therefore cannot allow further evidence by prosecution at this stage but prosecution will be given liberty to cross-examine the witnesses for the defence.

(ii) When cross-examined if Bairulia carried a plastic bag, accused replied "Saya tidak nampak". He also said he did not know why the police lied about him carrying the bag with the ganja in it.

Miss Chin Pau Shien's submission that accused was not guilty was based on the evidence of the accused who, in his defence, said that he never carried any bag at any time. Even under cross-examination, the accused at all material time maintained that he never carried the said package Exhibit P4 or any other bag. The accused was not caught red-handed with the package P4 as he had thrown it down. This was confirmed by the evidence of PW4, ASP Zainuddin Wahab, PW6 D/Cpl. Ong Teck Lee and PW7 D/PC Michael Chan.

I was disappointed in that Miss Chin's final submission and the submission she put forth on no case to answer were, except for a few paragraphs, word for word the same. But I must hasten to add that the learned defence Counsel did her best. As I had dealt with the points Miss Chin had raised at the end of the prosecution's case. I will now deal with other additional points.

(i) The learned DPP quoted *D.A. Duncan v. PP* [1980] 2 MLJ 195 where Raja Azlan Shah (CJ Malaya as he then was) stated that:

> ...the High Court came in our view, to the correct conclusion that this denial did not cast a doubt on the prosecution case...

(ii) The learned DPP ended his submission by saying that no evidence was given by the defence to rebut s. 37(d):

> (d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug:

or s. 37(da):

(da) any person who is found in possession of:

...

(vi) 200 grammes or more in weight of cannabis, [Sub. Act A596]

(vii) 200 grammes or more in weight of cannabis resin: [Ins. Act A596]

(viii) a total of 200 grammes or more in weight of cannabis and cannabis resin: [Ins. Act A596]

otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug;

(iii) He quoted *PP v. Badrulshah Bin Baharom* [1988] 2 MLJ 585 where Lim Beng Choon J held:

> (4): ...in the circumstances, the accused failed to rebut the presumption under s. 37(d) of the Dangerous Drugs Act 1952 and as the amount of cannabis in his possession exceeded the limit prescribed in s. 37(da) of the Act, the presumption under s. 37(da) is also applicable against him and he likewise failed to rebut that presumption...

(i) As for the basic definition of trafficking, s. 2 of the Dangerous Drugs Act states that this:

> includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug.

(ii) In a sense, the evidence was clear that the accused in our instant case was "carrying" the drugs. Whether or not he was also "sending", or "delivering" or "supplying" or "distributing" was not in evidence. There was no need for further evidence in any case.

At the end of the trial, I told the learned DPP, learned defence Counsel and the accused that:

> This has been a fairly long case going over 4 days. There are several authorities cited and evidence been put by both prosecution and defence. I shall have to consider the evidence as a whole and taking the principles and precedents into account. So I shall postpone my decision to 7 May 1991. There will be a civil trial for me to preside one whole month in April. So 7 May 1991 will be the earliest.

I have looked at the following High Court judgments in recent trials under s. 39B(1) of the Dangerous Drugs Act.

(i) *PP v. Tan Huang Hiang* [1990] 2 MLJ 24. Accused was acquitted where Peh Swee Chin J held:

> It was more probable than not that two other persons had each a complete set of keys to the factory premises. Further, the landlady was living at the back portion which was not sealed off from the front portion where the factory was. On such evidence, it would be quite impossible to say that it must be the accused who had hidden the drugs in the room in that house, except for the crucial words.

In our case, the prosecution witnesses had testified clearly that it was the accused who was holding the bag which contained the cannabis just before his arrest.

(ii) *PP v. Chew Yoo Choi* [1990] 2 MLJ 444. Accused was acquitted where Faiza Tamby Chik JC held:

> There had been a break in the chain of evidence concerning the custody of the heroin seized. This gave rise to an adverse inference against the prosecution's evidence. The prosecution's failure to call evidence to fill this gap was fatal and could not be cured by inviting the defence to supplement the prosecution's case by calling the witnesses offered. The accused was charged with having trafficked in 16.59g of heroin which was found in a house where the accused had been arrested. The heroin seized was placed in the custody of a senior police officer before their production in Court. This senior police officer was never called to give evidence.

In our case, the Senior Government Chemist and ASP Lim, after receipt of the exhibits from ASP Zainuddin, had kept the exhibits under strict custody and handed to the other for safe-keeping until production in Court. There was no question raised as regards any break in the chain of custody. Hence the presumption in s. 114(e) of the Evidence Act acts in favour of the prosecution.

(iii) *PP v. Tee Kim Pong* [1990] 2 CLJ (Rep) 868. Accused was acquitted where K.C. Vohrah J held:

> The accused had, however, on a balance of probabilities rebutted this presumption. His explanation of how the boxes were entrusted to him and the fact that he was the one who brought the attention of the customs officers to the boxes and his subsequent assistance to the authorities were consistent with his innocence.

The accused in the instant case offered no such explanation or assistance. He in fact threw down the package containing the cannabis and tried to escape.

(iv) *PP v. Lim Chang Min* [1990] 2 MLJ 497. Accused was convicted and Shankar J held:

> The issue as to whether a person knew or did not know something will depend upon credibility. The accused contradicted himself on who gave him the package and on how much he was paid. These were serious discrepancies. The fact that the accused knew that Tan was a supplier of drugs and the fact that the accused concealed the package in his trousers suggested that he knew its contents.
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> [Editorial Note: The accused appealed in the Supreme Court *vide* Criminal Appeal No. 05-18 of 1989. The appeal was dismissed by the Supreme Court comprising of Lee Hun Hoe CJ (Borneo), Mohamed Azmi and Ajaib Singh SCJ on 11 September 1989.]

Conclusion:

In accordance with s. 273 of the Criminal Procedure Code, I have to pronounce the following in the presence of the accused in open Court:

A. The defence had every opportunity to explain accused's arrest and the seizure of the drugs. Both the prosecution and the defence had aired legal principles and precedents to suit each aspect of the case. On the whole, I have to say that I cannot find any reason for the police to lie about the accused. On the contrary, they carried out their ambush in a professional manner and seized quite a large package of what is now tested and proved as cannabis.

B. I found that accused had possession of the drugs on the evidence before me and as the amount exceeded 200 grammes (it being 714.5 grammes) the presumption that he

trafficked comes into play by virtue of s. 37(da) of the Dangerous Drugs Act 1952. I cannot say that accused had been able to rebut this presumption. He did not even offer any excuse much less any plausible excuse or reason to be in the area and at the scene where the crime was committed.

C. After all the facts and principles have been dealt with and argued. I find that accused, Rudy Bin Jamlali, is a person who contravenes s. 39B(1)(a) of the Dangerous Drugs Act 1952 and I therefore find him guilty of the offence under the Act. Accordingly I convict him. As punishment, I sentence him in accordance with s. 39B(2) of Dangerous Drugs Act, to death. By s. 277 of the Criminal Procedure Code, I direct that he be hanged by the neck till he is dead.

The exhibits will be handed over to police for custody and destruction after the period of appeal.

Also found at [1992] 3 CLJ 1628